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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re M.B., a Person Coming Under the Juvenile  
Court Law.

STANISLAUS COUNTY COMMUNITY  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

JESSE B.,

Defendant and Appellant.

F078366

(Super. Ct. No. 517959)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q.  
Ameral, Judge.

Jessica M. Ronco, under appointment by the Court of Appeal, for Defendant and  
Appellant.

John P. Doering, County Counsel, and Maria Elena Ratliff, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Smith, Acting P.J., Snauffer, J. and DeSantos, J.

## **INTRODUCTION**

Appellant Jesse B. is the father of M.B., a minor. After reunification services had been terminated, but before parental rights were terminated, father filed a Welfare and Institutions Code<sup>1</sup> section 388 petition. Father contends the juvenile court abused its discretion when it denied his section 388 petition without an evidentiary hearing. We affirm.<sup>2</sup>

## **FACTUAL AND PROCEDURAL SUMMARY**

When M.B. was born in late March 2017, mother<sup>3</sup> tested positive for several substances including THC, opiates and amphetamine.<sup>4</sup> Father tested positive for multiple substances including THC, benzodiazepine, methamphetamine and MDMA, commonly known as ecstasy. The Stanislaus County Community Services Agency (agency) established a safety plan to allow M.B. to go home with her parents, who resided with paternal relatives. A family maintenance plan was created, and both parents were to submit to substance abuse assessments and participate in substance abuse treatment; neither parent complied.

On May 24, 2017, a neighbor reported that father was holding a gun to his head, with mother and M.B. in the room. On June 5, 2017, after numerous attempts to meet with and assess the parents, social workers attempted a home visit. When they inquired about the parents at the residence, the social workers were told to “Check the trailer.”

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<sup>1</sup> References to code sections are to the Welfare and Institutions Code.

<sup>2</sup> Father’s appeal from the termination of his parental rights is before this court in case No. F078574.

<sup>3</sup> Mother is not a party to this appeal.

<sup>4</sup> THC refers to the chief intoxicant in marijuana. (<https://www.merriam-webster.com/dictionary/THC>, as of May 9, 2019.)

The social workers knocked on the door of the trailer and although they could hear noises from inside, no one answered. The social workers called for police assistance.

Police officers arrived and informed the social workers that the address had “constant traffic and people arrested for drug charges.” Officers pulled father from the trailer; father stated mother and M.B. were inside. Officers entered the trailer and found a tablet of pain medication with codeine in M.B.’s crib. Multiple pipes and needles, and a burnt piece of foil consistent with heroin use, were in the trailer. Mother admitted to having recently used methamphetamine.

Father admitted he had been arrested and released on May 26, 2017, for a physical altercation with his mother. Father acknowledged using methamphetamine and heroin after he was released.

Both parents were arrested for child endangerment. M.B. was taken into protective custody and placed in foster care. A section 300 petition was filed on behalf of M.B., who was just over two months old.

At the June 8, 2017 detention hearing, both parents were in custody but appeared at the hearing. The parents were advised to contact the agency as soon as they were released from custody to arrange for visitation. The parents were also informed that reunification services may be limited to six months, during which time they would be expected to “make significant progress in resolving the issues that caused your daughter to be removed from your care.” Both parents filled out Indian Child Welfare Act (ICWA) forms indicating they may have Indian heritage.

The jurisdiction and disposition report noted that despite numerous attempts at contact, the parents had not made themselves available to the agency so that the ICWA notice could be completed. The parents also failed to fill out questionnaires on their social history. Father was considered an alleged father because he was not listed on M.B.’s birth certificate and the agency recommended a denial of reunification services.

Father had not visited with M.B. since detention. Both parents had been given referrals for parenting, co-dependency, individual counseling, and substance abuse assessments. Neither parent followed through on any of the referrals and neither parent completed a substance abuse assessment.

At the July 19, 2017 jurisdiction and disposition hearing, neither parent appeared even though they were not in custody. The juvenile court continued the matter for the agency to serve ICWA notices, using whatever information was available.

On August 22, 2017, father signed a declaration of paternity. The agency recommended he be elevated to presumed father status and provided reunification services. Father had completed a substance abuse assessment. The juvenile court found the section 300, subdivision (b) allegations of the section 300 petition true, declared M.B. a dependent of the juvenile court, removed her from parental custody and granted reunification services to both parents. The juvenile court again admonished the parents that “services may be limited to a period of six months” and that it was “very, very important that both of you make nothing but excellent progress.”

The case plan approved for father required him to participate in individual counseling, complete a parenting program, participate in a substance abuse assessment and follow all recommendations from the assessment and submit to random drug testing. Visitation was to be once per week.

The juvenile court found ICWA did not apply on October 18, 2017.

On November 8, 2017, an interim review hearing was held. Neither parent appeared. Father had refused to submit to random drug testing on October 23, 2017, indicating he would test positive for THC. Father was not in substance abuse treatment and had not begun parenting classes. Father was reported to be making little to no progress on his case plan.

The six-month review report recommended termination of reunification services for both parents and the setting of a section 366.26 hearing to terminate parental rights. Father had missed 10 scheduled visits with M.B.; had refused to submit to drug testing in September, October, and November 2017; and had not completed any component of his case plan. The social worker noted father “has had a long history of drug use.” The social worker opined that there was not a substantial probability M.B. would be returned to her parents with an additional six months of services because of the ongoing substance abuse issues and failure to complete any component of the case plan. “Continuing services would only delay permanency and [] stability” for M.B.

The review hearing was eventually held on April 19, 2018. Father submitted a certificate indicating that as of April 13, 2018, he had completed three months of residential and outpatient treatment. Father was living in a sober living environment. A report from Stanislaus County Adult Drug Court reported father’s diagnosis as “Opioid Use Disorder, Severe,” and indicated father had tested negative on April 17, 2018.

The juvenile court noted that father entered “into drug treatment” so he could “avail himself of adult drug court and stay out of jail.” The juvenile court also stated that “father has been diagnosed with severe opoid [*sic*] use disorder, and having three months of sobriety, while it is commendable, is not, in this Court’s mind, sufficient.” It also was noted that there were multiple instances of positive tests and refusals to test by father in the dependency case. Father had attended only one individual counseling session and had “a long, long ways to go.”

The juvenile court noted that father did not have a “history of regular and consistent visits” with M.B. M.B. had been out of parental custody for over 10 months and the “12-month date would be August 5th, at the very latest.” The juvenile court opined that father could not adequately address his severe opioid use disorder and be able

to have M.B. returned to his care by that date. The juvenile court found father's progress to be "limited" and terminated reunification services and set a section 366.26 hearing.

The section 366.26 report recommended termination of parental rights and a permanent plan of adoption. M.B. had been moved to a new home on July 21, 2018, because of an emergency in the previous foster home. M.B. was adjusting well in the new home. Father had been visiting once monthly, as allowed, but the visits were not generally positive. M.B. often cried when father tried to hold her or play with her.

New counsel was appointed for father on August 17, 2018, who sought to file a section 388 petition. The juvenile court ordered counsel to file any section 388 petition by August 21, 2018. The juvenile court asked for the visitation logs of father's visits to be submitted to the juvenile court and continued the hearing.

The visitation logs reflected that M.B. was consistently happy before visits with father and anxious or crying during visits with him. On April 3, 2018, M.B. did not want to leave the social worker's arms to go to father and cried throughout the visit. On August 10, 2018, M.B. was upset at the start of the visit; immediately turned away from father when she saw him; and cried for 30 minutes, at which point the visit was ended. When the social worker removed M.B. from the room, she stopped crying.

Father filed his section 388 petition on August 21, 2018, seeking the reinstatement of reunification services. Father alleged he had been sober for over nine months; was residing in a sober living home; had completed three months of treatment; was attending Alcoholics Anonymous and Narcotics Anonymous meetings; and was engaging in community work with the Salvation Army. Father asserted that granting his section 388 petition was in the best interests of M.B. because she had only been in the new foster home for one month and had not formed any significant bond.

The agency filed an amended section 366.26 report indicating the foster family had been unwilling to continue providing a home for M.B. because of the length of time

it could take to complete the court process. M.B. was moved to a new foster home on August 21, 2018, and was bonding well with the new caregivers and their three children. Father failed to attend a visit with M.B. scheduled for September 4, 2018.

The juvenile court held a hearing on October 9, 2018, to determine whether to grant an evidentiary hearing on the section 388 petition. Father's counsel asked that the section 388 petition be granted outright or an evidentiary hearing be set. Counsel for M.B. opposed the section 388 petition. County counsel opposed an evidentiary hearing and the granting of the petition. County counsel argued father's case plan called for him to participate in parenting classes and individual counseling, not just substance abuse treatment and maintained there was no evidence that granting the section 388 petition was in M.B.'s best interests.

The juvenile court noted that many of the matters alleged to constitute changed circumstances were things that had been completed when reunification services were terminated. The juvenile court opined that if a parent's circumstances had not changed sufficiently to permit placement of the child with the parent, reopening reunification would not promote stability and would not be in the best interests of the child.

The juvenile court noted that father took "a significant period of time to get on board with addressing his substance abuse issues." The juvenile court found it concerning that "a number of visiting logs" revealed M.B. had a difficult time visiting with father. The juvenile court stated that section "388 is really an escape mechanism" for when parents have completed a reformation before parental rights are terminated.

The juvenile court concluded there had not been a sufficient showing to grant an evidentiary hearing on the section 388 petition and denied the petition.

Father filed a timely appeal of the denial of his section 388 petition.

### **DISCUSSION**

Father's sole contention on appeal is that the juvenile court erred in denying his

section 388 petition to reinstate reunification services without holding an evidentiary hearing. Father contends he made the requisite prima facie showing entitling him to a hearing. We disagree.

### ***Standard of Review***

We review the juvenile court's denial of father's section 388 petition without an evidentiary hearing for abuse of discretion. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.) The denial must be upheld unless we can determine from the record that the juvenile court's decision exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the juvenile court. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

### ***Analysis***

A petition to modify a juvenile court order under section 388 must allege facts showing new evidence or changed circumstances exist and that changing the order will serve the child's best interests. (§ 388, subd. (a)(1)-(2); *In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) Courts must liberally construe a section 388 petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) However, section 388 requires a petitioner to make a prima facie showing of both elements to trigger an evidentiary hearing. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) If, for instance, the parent makes a prima facie showing of changed circumstances, the juvenile court can still deny the petition without an evidentiary hearing if the parent fails to make a prima facie showing that the relief sought would promote the child's best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188–190; see *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 322–323.)

“ ‘A “prima facie” showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ ” (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 418.) Consequently,



section 388 petitions with general, conclusory allegations do not suffice. Otherwise, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We conclude that the juvenile court did not abuse its discretion in denying father's section 388 petition without a hearing. The juvenile court's finding that father's period of sobriety did not constitute "changed circumstances" was reasonable. Appellate courts have often held that when a parent has a history of substance abuse, recent relatively brief sobriety constitutes "changing" rather than "changed" circumstances. To support a section 388 petition, the change in circumstances must be substantial. (*In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577.)

At the time father's section 388 petition was filed on August 21, 2018, father claimed he had been sober for nine months, with a sobriety date of November 14, 2017. However, father had refused to drug test on November 19, 2017, with the understanding his refusal would be considered a positive test. Father's first clean test was on January 15, 2018, which was seven months prior to the filing of the section 388 petition. Father's claim of sobriety for nine months was not supported by the record.

Father was approximately 30 years old at the time the section 388 petition was filed. He had amassed a criminal record over the prior six years, including convictions for burglary and theft. Father had tested positive on March 30, 2017, for multiple controlled substances, including methamphetamine. A safety plan for M.B. and family maintenance services for father were put into place. Father failed to follow through on substance abuse treatment. Father continued to abuse substances and on June 5, 2017, police found multiple pipes, needles, and burnt foil consistent with heroin use in father's

home. Father was arrested.

The only change between the time services were terminated on April 19, 2018, and the filing of the section 388 petition on August 21, 2018, was that father claimed he had maintained sobriety during that span of time. The documentation attached to the section 388 petition reflects that father was in the second of four phases of court ordered treatment. Father had completed three months of substance abuse treatment while living in sober living facilities and continued to reside in sober living facilities. Whether father would maintain sobriety when no longer under a court order for treatment and not living in a sober living facility was uncertain; father had demonstrated previously an unwillingness to voluntarily seek substance abuse treatment and maintain sobriety.

Father's recent sobriety reflects "changing," not changed, circumstances. (See e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) "It is the nature of addiction that one must be 'clean' for a *much longer period* than 120 days to show real reform." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9, italics added.) Father's completion of a drug treatment program and seven months of sobriety, though commendable, is not a substantial change of circumstances.

Father also failed to demonstrate changed circumstances because there was no evidence that he had completed the individual counseling or parenting classes that were components of his case plan.

The court's finding that the section 388 petition was not in the best interests of M.B. also was reasonable. Parent and child share a fundamental interest in reuniting up to the point at which reunification efforts cease. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697, overruled on other grounds in *John v. Superior Court* (2016) 63 Cal.4th 91, 99, fn. 2.) By the time of a section 366.26 hearing to select and implement a child's permanent plan, however, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Therefore, after reunification

efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) In fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id.* at p. 310.) "A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Here, the evidence established that M.B. was adjusting well in her current foster home. In visits with father, M.B. was unhappy and cried. Father missed the scheduled visit on September 4, 2018, after he filed his section 388 petition. Father had not completed individual counseling or parenting classes, was in progress on substance abuse treatment, and was residing in a sober living facility. M.B. could not be placed with father under these circumstances and granting the section 388 petition would only delay permanency for M.B.

Our role as a reviewing court is to assess whether the court below committed error based on the record before it, and we do not reweigh evidence or rely on evidence that was not in the court's record at the time it made its order. "[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration. (See *People v. Pearson* (1969) 70 Cal.2d 218, 221, fn. 1; *People v. Preslie* (1977) 70 Cal.App.3d 486, 490; [citation].)" (*In re James V.* (1979) 90 Cal.App.3d 300, 304.) Based on the record before the juvenile court at the time the court ruled on father's section 388 petition, we find the juvenile court did not abuse its discretion in denying the section 388 petition without an evidentiary hearing.

### **DISPOSITION**

The juvenile court's order is affirmed.